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No. 82-331

In the Supreme Court of the United States

October Term 1982

STATE OF NEW MEXICO and HAROLD F. OLSON, Individually and as Director, New Mexico Department of Game and Fish,

Petitioners,

v.

MESCALERO APACHE TRIBE,

Respondent.

BRIEF OF AMICUS CURIAE STATE OF UTAH IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether the Tenth Circuit complied with this Court's instructions to reconsider its original decision in this case in light of *Montana v. United States*, 450 U.S. 544 (1981).

2. Whether the Mescalero Apache Tribe has "inherent authority" over wildlife within the Mescalero Apache Reservation which pre-empts the application of state game and fish laws to non-Indians hunting or fishing within the reservation.

3. Whether the application of state game and fish laws to non-Indians hunting and fishing on the Mescalero Apache Reservation infringes on the right of the Mescalero Apache Tribe to self-government.

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INTEREST OF UTAH AS AMICUS CURIAE

This case is of extreme importance to Utah and all States having large tracts of Indian land within their borders. The decision of the Tenth Circuit Court of Appeals below, if affirmed, will result in a virtual confiscation of important wildlife resources. In practical effect, certain species of public wildlife resources migrating on and off Indian reservations would be converted to the status of tribal livestock while they were on reservation lands. The State of New Mexico and the State of Utah

as amicus clearly have an ownership interest in trust and a management responsibility over game species within their borders which are not destroyed or defeased when the animals cross from state lands to reservation lands.

The State of Utah contains within its borders two major Indian reservations — the Uinta-Ouray Reservation and portions of the Navajo Reservation — comprising millions of acres. These reservations contain trust lands and also a great amount of non-trust lands, including federal, state, and private property. Many species of game and fish abound within these reservations, such as deer, elk, antelope, bighorn sheep, pheasants and chukar. Big game animals in particular do not remain year-round on the reservations but migrate freely, usually from summer ranges to winter ranges. For example, the northern portions of the Uinta-Ouray Reservation in northeastern Utah abut the Ashley National Forest on the south slope of the Uinta Mountains. During the spring and summer, the local deer and elk herds migrate from reservation lands up into the national forest for their summer range. During the fall and winter, these animals migrate down to lower elevations to escape the mountain snows, and cross back into the reservation. Such herds are managed as part of the state's overall game management plan—which includes season and harvest criteria—in order to maintain viable game populations within the State.

The State of Utah is also seriously concerned that the decision of the court below leaves a massive juris-

dictional vacuum. Indian tribes do not have the power to punish or try non-Indians for criminal offenses, absent a specific congressional authorization (*Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 [1978]), and no pre-emption, express or implied, has been made by Congress in this area.[1] There are no general federal game laws, and nothing to grant tribal courts jurisdiction over non-Indians who violate tribal game ordinances. Therefore, if the holding of the court below is affirmed and the states are forbidden to apply their game laws to non-Indians on the reservation, it would be impossible to prosecute non-Indians for acts committed on the reservation which violate both state game laws and tribal ordinances.

The lower court's decision, if affirmed, will have the potential of totally disrupting long established game management programs, and could divest the states of their sovereign rights to regulate and control the harvesting of game by non-Indian sportsmen within their borders.

ARGUMENT

I. *Preface*

The State of Utah fully supports and concurs in the points raised and argued by the State of New Mexico in its brief, and simply wishes to present the few additional comments set forth below.

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[1] The only possible vehicle for enforcement would be 18 U.S.C. §1165 which is a trespass statute and does not directly relate to the illegal taking of fish or game. See **Oliphant v. Suquamish Tribe, supra.**

II. *The Decision of the Tenth Circuit on Remand Ignores This Court's Instruction to Reconsider the Case in Light of Montana v. United States*

Upon granting the State of New Mexico's previous petition for a writ of certiorari, this Court vacated the decision of the Tenth Circuit and remanded the case with the clear instruction that the Tenth Circuit should reconsider its decision "in light of *Montana v. United States*, 450 U.S. 544 (1981)." 450 U.S. 1036 (1981). On remand, however, the Tenth Circuit chose to distinguish this Court's opinion in *Montana*, and simply reinstated its previous decision based on this Court's decision in *Merrion v. Jicarilla Apache Tribe*, ... U.S. ....., 71 L.Ed. 2d 21 (1982).

The Tenth Circuit was in error to lightly brush aside the principles announced by this Court in *Montana*, and base the reinstatement of its previous decision on *Merrion* — which did not even deal with game and fish jurisdictional matters, but dealt instead with the authority of an Indian tribe to levy a mineral severance tax. The *Merrion* case did not even address the issue of whether or not a state could levy a concurrent mineral severance tax.

It is abundantly clear that *Merrion* is irrelevant to the issues to be decided in this case, especially since this Court specifically instructed the Tenth Circuit to review its decision in light of *Montana*. The issues to be resolved in this case were addressed by this Court in *Mon-*

tana, not *Merrion*, and the Tenth Circuit erred in ignoring the instructions of this Court on remand.

III. *State Regulation of Non-Indian Hunters Will Not Impair Tribal Sovereignty*

This Court made it clear in *Montana v. United States, supra*, that Indian tribes retain certain attributes of sovereignty to exercise jurisdiction over non-Indians only where the regulations promulgated have a clear and direct relationship to tribal self-government. However, the enforcement of New Mexico's game laws regulating non-Indian hunters on the Mescalero Apache Reservation—whether hunting on trust or non-trust lands—would not interfere with any attributes of tribal sovereignty or tribal self-government.

The tribal members are, of course, free to hunt and fish on the reservation and in so doing are not subject to state laws. The tribe is also free to formulate game and fish management programs within the reservation. The point to be made is that there is a big difference between tribal members fishing and hunting for their own subsistence, and the commercialization of hunting and fishing such as is presently being promoted on the Mescalero Reservation. The obvious drawing card for reservation hunting—from the Indians' point of view—is that they can offer out-of-state hunters a cheaper and more attractive hunt if those hunters do not have to obtain a non-resident New Mexico license or abide by the State's general game and fish laws.

In this respect, the situation is not unlike that of the Indian "smokeshops" addressed by this Court in *State of Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980). There is no valid reason why non-Indians, hunting on the reservation, should not be required to obtain a valid state hunting license. That requirement certainly does not interfere with any attributes of tribal self-government. The Tribe, in seeking to exempt non-Indian hunters from state law, is simply attempting to attract more hunters and thereby avail itself of the accompanying economic benefits and competitive advantages.

Aside from depriving the States of revenues from the sale of hunting and fishing licenses, the tribal commercialization of these wildlife resources can have a detrimental effect on game herds which migrate back and forth across reservation boundaries. The Tribe, and the lower court in making much ado about the tribe's interest in game on the reservation, appear to see the reservation's deer, elk, bear and antelope populations as tantamount to Indian livestock—comparable to a "natural resource" just like timber or an ore deposit. Indeed, no legitimate interest of the Tribe can be said to be threatened by state jurisdiction over non-Indian hunting unless this rather unorthodox view is accepted.

But forests and mineral deposits do not range freely on and off the reservation as do its deer, elk, bear and antelope populations. This is not a case like the "put-and-take" fishing in *Eastern Band of Cherokee Indians*

v. North Carolina Wildlife Resources Commission, 588 F.2d 75 (4th Cir., 1978), on which the Tribe relies so heavily. Is it the Tribe's assertion that its alleged ownership of these animals goes through a semi-annual cycle of vesting and divesting as the game animals migrate back and forth across the reservation's boundaries? It cannot reasonably be argued that the State has an interest in such game animals only during the times they spend off the reservation.

State regulation of non-Indian sportsmen on Indian reservations cannot be said to impair tribal sovereignty, since such "sovereignty" extends only to the tribe's internal affairs. This case deals with the relationship between New Mexico and non-Indian sportsmen.

CONCLUSION

The holding of the Tenth Circuit Court of Appeals, if affirmed, threatens to tragically disrupt game management—not only in New Mexico but in every State having large tracts of reservation land within its borders.

For the foregoing reasons, coupled with the reasons set forth by Petitioner State of New Mexico, the State of Utah respectfully submits that the decision of the United States Court of Appeals for the Tenth Circuit should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, David L. Wilkinson, Attorney General of and counsel for the State of Utah, and a member of the Bar of this Court, do hereby certify that three copies of the foregoing BRIEF OF AMICUS CURIAE STATE OF UTAH IN SUPPORT OF PETITIONERS were served upon each of the following by mailing the same, postage prepaid, this 10th day of January, 1983, all in accordance with the Rules of this Court:

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